NO. 89-1498

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In the Supreme Court of the United States

OCTOBER TERM, 1989

NEW ORLEANS STEAMSHIP ASSOCIATION,
Petitioner

versus

PLAQUEMINES PORT, HARBOR & TERMINAL DISTRICT,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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STATUTES:

33 U.S.C. 5 4,5

33 U.S.C. 10 4,5

I. THE HARBOR DEVELOPMENT & NAVIGATION IMPROVEMENT ACT OF 1986 CLEARLY AND SPECIFICALLY PROHIBITS THE PLAQUEMINES FEES.

Congress found, as reflected in the House Report quoted in the petition[1], that non-Federal interests were not empowered to levy fees, under the Constitution, for emergency standby (or indirect) services, absent its authorization.

With this understanding, it then gave authorization only to those non-Federal entities which undertook projects pursuant to the HDNI Act. As Plaquemines states[2], it does not qualify thereunder.

The HDNI Act is very explicit. It forbids fees charged by non-Federal interests prior to the completion of a project (or usable segment); it requires the discontinuance of those fees when the cost of the project has been recovered by the non-Federal interest.

It is, we submit, patently absurd to assert that an interest not undertaking a harbor improvement project is entitled to assess such fees while one proceeding with a project cannot commence to assess them until a unable segment of the project has been completed. It is equally absurd to suggest that an entity not undertaking a project is entitled to charge fees while one creating a harbor improvement is required to cease levying the fees when the cost of its project has been recovered.

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1. Petition, p. 18.

2. "It is uncontroverted that the Port has not undertaken any harbor improvement project and that the Port is not financing a harbor improvement." Opposition Brief for Respondent, p. 8.

The total error of the decision may be reflected best in the statement in the Plaquemines reply[3] that the HDNI Act "prevents ports from fraudulently charging for projects that are mere speculation" while urging that it is entitled to charge fees where even a speculative project is not on the horizon. The terms of the HDNI Act, and its legislative history, are entirely plain. Entities such as Plaquemines can charge fees for emergency response services only when those fees are levied under the terms of the Act and in connection with a project undertaken pursuant to it.

The HDNI Act specifically precludes non-Federal interests from levying such charges other than in conformance with its terms. This is the clearly expressed intent of Congress; Plaquemines does not qualify under the Act and its fees are unlawful.

II. THE DECISION IS DIRECTLY CONTRARY TO *JAPAN LINE.*

The Plaquemines' contention that *Japan Line* is inapposite because it involved an *ad valorem* charge against foreign owned containers while Plaquemines assesses charges against foreign owned vessels based on length and on cargos in foreign commerce based on tonnage (or barrels of liquid) states a distinction without a difference.

The charges are identical in their application against foreign commerce and in their justification, i.e., in *Japan Line* the tax was " 'fairly related to the services provided by' California, services that include not only police and fire protection, but the benefits of a trained work force and the

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3. Opposition Brief for Respondent, p. 9. Quoted from the decision.

advantages of a civilized society."[4]

The argument by Plaquemines that the Federal Maritime Commission exercises a "reasonableness standard" with respect to it simply is not accurate. The statute in question, 46 U.S.C. App. 1709 (d)(1), requires that regulated entities "establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property." Plaquemines does not, in any manner, receive, handle, store, or deliver property. Accordingly, its charges cannot be brought within the ambit of this section of the Shipping Act.

If the nation is to have the ability to speak with one voice, the voice is that of the Congress, not the Federal Maritime Commission. Congress has spoken - in the HDNI Act. It has forbidden the charges assessed by Plaquemines and *Japan Line* cannot be reconciled with the decision.

III. THE DECISION IS DIRECTLY CONTRARY TO *WUNNICKE.*

The *Wunnicke* decision involved a contract by the State of Alaska for the sale of timber on its public lands which required that primary manufacture be conducted in the state. This followed identical requirements imposed by the federal government on timber taken from federal lands within the state. It was held in the Court of Appeals that this "parallel" policy of the federal government authorized Alaska's imposition of those terms on the sale of its timber. Even this did not serve to overcome the prohibitions of the dormant Commerce Clause.

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4. *Japan Line Limited v. County of Los Angeles,* 441 U.S. 434 @ 445, 60 L.Ed.(2d) 336 @ 346, 99 S.Ct. 1813 (1979).

Here, in contrast, we have express congressional prohibitions contained in the HDNI Act, 33 U.S.C. 10 and 33 U.S.C. 5.

The statement by Plaquemines that "the port's fees have not been proven to impose 'substantial' burdens on interstate and foreign commerce"[5] is not meaningful. There was no proof taken; the suit was dismissed on a motion for dismissal without trial. Additionally, as noted in the petition, a charge of $1,500,000 per year is a substantial burden on commerce.

IV. THE PLAQUEMINES CHARGES VIOLATE THE IMPORT/EXPORT CLAUSE

Plaquemines misapprehends the scope of the Import/Export Clause. It does not forbid only charges which are levied directly against the cargo itself.

The form of the charge or its imposition against the vessel rather than directly against the cargo is not material. A stamp tax on charter party agreements for the carriage of cargo was prohibited as a duty on exports, *U.S. V. Hvoslef,* 287 U.S. 1, 17, 59 L.Ed. 813, 820, 35 S.Ct. 459 (1915):

> "Again, it is contended that the tax bore only incidentally upon exportation. It was to be paid on all charter parties of vessels having a 'registered tonnage.' But, aside from any question as to the scope of this provision, the tax as applied to the charter parties here in question was nothing else than a tax on exportation, and to this extent was, in any event, invalid...."

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5. Opposition Brief for Respondent, p. 16.

The Plaquemines charges apply to all cargoes imported and exported to or from the inland states and directly implicate the clause.[6]

V. THE IMPACT OF 33 U.S.C. 10, THE ACT ADMITTING LOUISIANA TO THE UNION, 33 U.S.C. 5, AND THE TONNAGE CLAUSE

We have set forth our views on the several statutes and the constitutional provision in the petition. If the HDNI Act does not preclude the Plaquemines charges, Congress plainly is powerless to do so because it could not have been more explicit.

Plaquemines is correct in stating that the provisions of 33 U.S.C. 5 were not brought to the attention of the courts below until our reply brief before the Fifth Circuit. As to the language in the statute, we submit that the navigable waterways of the nation do "belong" to the United States although the beds are owned by the states and the water is not susceptible to ownership. If this is not the interpretation of the statute, it would appear that it is meaningless. As to the suggestion by Plaquemines that it does not charge for the right of passage, this is true only to a limited extent. It does charge a vessel which by reason of mechanical problems is forced to anchor within the parish or one which remains more than twelve hours

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6. We would note that the charges are not for services rendered but for the standby availability of normal governmental services, fire and police protection. The expenses budgeted to the port district include 5% of the free ferry system, the parish aviation system, the data processing department, and the parish governing body. *New Orleans Steamship Association v. Plaquemines Port, Harbor & Terminal District*, 23 S.R.R. (Pike & Fischer) 705, 731 (Initial Decision, F.M.C., 1985).

because of inclement weather. Such vessels clearly are exercising a right of passage subject only to emergencies which arise in its course.

Apart from the availability of emergency response services, Plaquemines has no genuine further function. It does not provide for "maintenance of the port and harbor" or "supervision of the shipping of the port", etc. These are functions which have been taken over by the federal government through the Coast Guard and Corps of Engineers. Since it has no wharf or other port facilities, it is a port authority in name only.

CONCLUSION

As suggested in the petition, the appropriate remedy here is to order reversal on the granting of *certiorari* to correct a patently erroneous decision.

The HDNI Act specifically forbids charging for emergency response services by non-federal entities absent a project undertaken pursuant to its terms. This is the mandate of Congress speaking with one voice for the nation under the Commerce Clause.

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the above and foregoing reply biref have been served on Louis B. Porterie, Esq. and Robert E. Fontenelle, Jr., Esq. by depositing the same in the United States Mail, postage prepaid, addressed to them at their office, 4000 General de Gaulle Drive - Suite 300, New Orleans, LA 70114, this ____ day of April, 1990.

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EDWARD S. BAGLEY